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**BY E-MAIL ONLY**

January 14, 2010

Board Secretary  
Ontario Energy Board  
2300 Yonge Street, Ste. 2701  
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2009-0063, Motion to Review and Vary Brantford Power's EB-  
2008-0698 Decision**

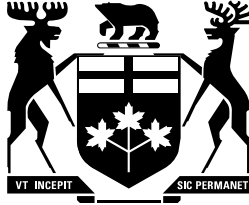
Please find attached Board staff's Submission on the above. Please forward the attached to the respective parties and all intervenors in this proceeding.

Yours truly,

*Original Signed By*

Christie Clark P.Eng.  
Case Manager

Enclosure



# **ONTARIO ENERGY BOARD**

## **STAFF SUBMISSION**

### **Motion to Review and Vary The Rates of Brantford Power**

**Brant County Power Inc.**

**EB-2009-0063**

**January 14, 2010**

## Introduction

On February 25, 2009 Brant County Power Inc.'s ("Brant County") filed a Motion to Review and Vary the 2008 Electricity Distribution rates of Brantford Power Inc. ("Brantford") set in EB-2007-0698 (the "Motion"). In Procedural Order #5 dated December 1, 2009 the Board set dates for interrogatories, responses and submissions. The following is respectfully submitted by Board staff and is based on the filed evidence, interrogatory responses and Brant County's Argument-in-Chief ("AIC"). In this submission, Board staff will at times refer to the GS 50 – 4,999 kW rate class as GS>50 kW, depending on the Exhibit in which the term is used, for the purposes of continuity with the exhibit. This is because the Tariff of Rates and Charges for Brantford refer to the class as GS 50 – 4,999 kW, however some exhibits refer to the class as GS>50 kW.

While Board staff has concerns about the fairness of the rates charged by Brantford to Brant County, it cannot overcome the fact that the rates effective September 1, 2008 emanate from a final rate order of the Board and cannot be retroactively or retrospectively changed.

## Background

On February 25, 2009 Brant County filed a Motion to Review and Vary the Brantford 2008 Cost of Service rates approved in EB-2007-0698 in a Rate Order dated August 29, 2008. The EB-2007-0698 application was filed December 20, 2007.

In the Motion Brant County has requested, among other things, that the Board:

1. Review the Decision in respect of the proper rates to be charged by Brantford to Brant County,
2. Make an Order declaring the charges levied beginning May 1, 2008 and prior to September 1, 2008 of no force or effect as the Interim Order dated April 21 2008 did not extend the 2007 rates to include Brant County, and
3. Specify the date on which Brantford is entitled to charge Brant County for retail transmission network and connection charges for Colborne Street East and Colborne Street West and for which Brant County Power Inc, is obligated to pay.

Brantford commenced billing Brant County on its 2007 GS 50 – 4,999 kW rate as of May 1, 2008. Brant County made one payment in July 2008. As of September 1, 2008 Brantford adjusted its billings to reflect the approved 2008 rates. No additional payments have been made by Brant County.

Due to a change of ownership of the Colborne Street East and Colborne Street West facilities in October 2005 the IESO began billing Brantford in February 2006 for Retail Transmission Service (“RTS”) Network and RTS Connection for Brant County. Neither Brantford nor Brant County appear to have noticed this at the time. In December 2009 Brantford issued the first bill to Brant County for these RTS arrears.

## **Highlights of Board staff Submissions**

The following is a summary of the key Board staff submissions found below:

1. Board staff submits that Brant County is sufficiently different from other GS 50 – 4,999 customers that it should be in another rate class. This is based on a review of:
  - Cost characteristics,
  - Volumes characteristics,
  - Allocated costs, and
  - Line losses.
2. Board staff submits that if the Board directs that a separate rate be set for Brant County:
  - The revenue-to-cost ratio for any specific rate for Brant County should fall within the range for the Large User class, that is 85% - 115%,
  - The GS 50 – 4,999 kW class’ revenue-to-cost ratio remain at the approved EB-2007-0698 ratio of 140%, and
  - Any additional revenue is to be recovered from those classes that have revenue-to-cost ratios below 100%.
3. Board staff submits that the new distribution rate is not to be retroactive, or retrospective.
4. Board staff submits that the RTS rates for Brant County should only be based on the RTS that is billed to Brantford for Brant County’s volumes.
5. The RTS arrears should be limited to 2 years.

## **A Separate Rate Classification**

Brant County requested that the Board review the Decision in respect of the proper rates to be charged by Brantford to Brant County.

To assess whether the GS 50 – 4,999 kW class is appropriate or not, Board staff relied upon Run 2 of the Cost Allocation Informational Filing (“CIAF”) updated for the 2008 approved numbers. Conceptually, the Board’s cost allocation model starts by examining and classifying costs first at the customer level and then moving away from the customer, step by step, up through the distribution system to the sources of supply. A good cost allocator can customize the model to reflect the characteristics of the specific utility and customers involved. This process recognizes the specific investment and other costs for each class of customers. By allocating costs this way, grouping like customers, and recognizing specific situations, fair rates are developed; such as rates that result in residential customers paying for residential meters only and rates that recognize customers for owning their own transformers. In contrast, by not recognizing the differences in cost structures and combining dissimilar customers, the accuracy from the detailed analysis that goes into a cost study is reduced.

Board staff submits that separate rate classifications are used when cost characteristics are sufficiently different from that of the others in a class that separate classes and therefore rates are required in the interest of fairness. The evidence suggests to Board staff that Brant County’s characteristics are sufficiently different from those of the customers in the GS 50 – 4,999 kW class that it should be in a separate class. Generally the facts that support being in a different class fall into two categories: Volumes characteristics and cost characteristics.

### **Volumes Characteristics**

Brant County has energy and demand volumes that are considerably greater than that of the average GS 50 – 4,999 kW customer. In fact, of the three delivery points from the transmission grid, the monthly demand for Brant County at the Colborne East point alone is 8,500 kW<sup>1</sup>. This places Brant County, at least for that delivery point, into the Large User class, and makes the GS 50 – 4,999 kW the incorrect class from the volumetric perspective.

Using the volumetric inputs from Run 2 of the CIAF for 2008, which was filed in response to Board staff Interrogatory 9, the differences in volumes can be developed. In Run 2 Brant County is separated into their own class. Using the information on Sheet I6 average demand for the GS>50 without Brant County included is 1,322,777 kW ÷ 12 months ÷ 408 customers or a monthly average demand of 271 kW. This can be

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<sup>1</sup> Brant County Power Inc. Argument in Chief, para. 44

compared to the monthly average demand for Brant County, which is  $170,406 \text{ kW} \div 12 \text{ months} \div 3 \text{ delivery points}$  or  $4,700 \text{ kW}$ . For energy the difference is similar in magnitude. Using the same Sheet I6, average annual energy is  $513,051,214 \text{ kWh} \div 408 \text{ customers}$  or  $1,257,478 \text{ kWh}$  for the GS>50 class compared to  $77,273,702 \text{ kWh} \div 3 \text{ delivery points}$  or  $25,757,900 \text{ kWh}$  for Brant County.

## Costs

In response to Board staff interrogatories, and from statements in the AIC, Board staff notes that the costs to serve Brant County are different from other customers in the GS 50 – 4,999 kW class. For example, in Board staff Interrogator 4 c) Brantford lists four services that are different from the other customers in the GS 50 – 4,999 class; wholesale rather than retail metering, reclosers for isolating the two distribution systems, load switching, and different collection characteristics for non-payment. It was also pointed out that Brant County owns its own meters. In the AIC in paragraph 64, Brant County stated that it is served directly from the 27.6 kV system which suggests to Board staff that Brant County is not served at transformed lower voltages as other GS 50 – 4,999 customers are. Based on cost causality, Brant County should not be responsible for these costs of transformers and distribution lines, poles and related equipment. This seems contrary to Brant County's statement in Board staff Interrogatory 4 b) where it states other than the four costs mentioned in Board staff Interrogatory 4 c) mentioned above, the costs for Brant County are the same as those for other GS 50 – 4,999 kW.

Some of these cost characteristics add costs while some reduce costs but the conclusion remains the same, that Brant County is different enough to warrant a separate classification.

Staff is of the view that when taken together these two general points are very significant. Rates are set based on class costs. The average cost per kWh that ends up in rates is based on the class costs and the class kWh volumes. With greater class volumes for any given cost level, a lower average cost occurs. As a result, the other customers on the GS 50 – 4,999 kW rate benefit from Brant County, whose volumes are significantly greater than the rest in the class. In addition, the components of Brant County's costs result in a different cost level than that required for the other GS 50 – 4,999 kW customers.

The following table was prepared by Board staff from Information found in Sheet I6 and Sheet O1 in Board staff Interrogatory 9:

	Col. 1 GS > 50	Col. 2 BCPI
1 Revenue Requirement (\$)	3,295,266	303,456
2 kWh	513,051,214	77,273,702
3 ¢/kWh	0.6423	0.3927

Board staff submits that the different cost structure and different volumes of Brant County result in average costs that are 40% less than the costs for the GS > 50 kW class. The other customers in the GS > 50 kW class experience a reduced rate because Brant County is included in the class. To staff, the results found in the table suggest that it is not fair to combine Brant County Power with the GS 50 – 4,999 kW customers.

### **A Further Characteristic of Uniqueness**

The distribution loss factor applied to Brant County's customers is 4.20%. This factor represents the total distribution system. In response to Board staff Interrogatory 11, Brantford estimated the losses on the 27.6 kV system for Brant County at approximately 1% for the main feed and approximately 2% on the alternate feed. Thus the costs associated with losses for delivery is less than half of the system average.

### **A Separate Class is Required for Brant County**

For all the reasons above, Board staff submits that the Board should consider a separate rate classification for Brant County that reflects its cost characteristics and volumes characteristics. In making this separation, the costs for the GS 50 – 4,999 kW will also be more appropriate.

### **Revenue-to-Cost Ratios**

In establishing this separate rate for Brant County, Board staff suggests that the Board direct Brantford to specifically address the revenue-to-cost ratios. There are three reasons for this.

The first is that the Board Report on *Application of Cost Allocation for Electricity Distributors EB-2007-0667, November 28, 2007* sets the revenue to cost ratio range as 85% to 115% for Large Users. It did so stating that: "The relative size of customers in this class means that better operating and cost data are available. The Board therefore considers the results of the cost allocation model for the Large User Class more reliable than the results in the case of the GS>50 Class." Board staff suggests the same

argument applies to setting a unique rate for Brant County and therefore the same range as for Large Users should apply.

The second point on revenue-to-cost ratios is that for the remaining GS 50 – 4,999 kW customers the revenue-to-cost ratio should not increase from that at which was approved in EB-2007-0698, which is 140%.

The third point is as indicated on Sheet O1 of Board staff Interrogatory 9, the cost ratio for the GS > 50 kW class increased when Brant County was placed in their own class. In order to not increase this ratio the revenue-to-cost ratios for some of the remaining classes, except for Brant County, may need to be adjusted. Board staff suggests any additional revenue should be collected from the classes below 100%.

## **Distribution Rate Implementation**

The Motion requested that the rates prior to September 1, 2009 should have no force or effect.

Board staff see that there are issues for implementation of the distribution rate to Brant County:

- Setting the effective date of the new rates,
- Determination of the arrears amount,
- Determining the interest on the arrears,
- IRM Adjustments

## **Effective Date**

### ***General Rule against Retroactive or Retrospective Rate-making***

Board staff submits that Brant County's request to revise Brantford's final rate order effective September 1, 2008 is not consistent with the principle of retroactive or retrospective rate-making.

The Supreme Court of Canada has ruled on the issue of retroactive ratemaking. In *Bell Canada v. CRTC*, Bell Canada appealed a decision of the CRTC which retroactively altered an interim rate that had previously been approved by the CRTC.<sup>2</sup> The Court held that, while interim orders may be reviewed and remedied by a final order, a final order is not subject to retrospective review and remedial orders.

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<sup>2</sup> *Bell Canada v. Canada* (Canadian Radio-Television and Telecommunications Commission) [1989] S.C.J. No. 68 ("*Bell Canada v. CRTC*") at pp 708 and 710



The Supreme Court also confirmed that “positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to a period prior to the final decision itself” such that a regulator in a positive approval scheme does not have authority to set rates retroactively (i.e. adjusting past rates) or retrospectively (i.e. adjusting future rates to account for past losses / gains).

The Board’s rate-making authority under section 78(3) of the Act is a “positive approval” scheme under which a utility’s rates are fixed prospectively based on a forecast of the utility’s revenue requirement for a future year. There is no provision in the Board’s enabling statute to allow for retroactive or retrospective rate-making.

A “fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language.”<sup>3</sup> The Ontario Energy Board Act, 1998 does not contain provisions that deal specifically with retroactive rate-making and therefore the Board is generally not empowered to alter a final rate order retroactively.

While a reclassification may be very desirable for Brant County in the present case, the Board has considered and denied such a request in an earlier decision. In the earlier decision the Board considered a request for reclassification and rate change in a final order as it applied to Boniferro Millworks (“Boniferro”), a large customer of Great Lakes Power Limited (GLPL).<sup>4</sup> Boniferro had taken over part of the operations of Domtar, a large customer of GLPL which had been classified as “Large Customer A” by GLPL just before Bill 210 came into effect.<sup>5</sup> The Bill 210 rate freeze made all interim rate orders final and Boniferro ‘inherited’ the rate classification of its predecessor, Domtar, and was therefore ‘stuck’ with a final rate order. Boniferro argued that it should not have the same classification as Domtar had and asked the Board to adjust the rate it had been

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<sup>3</sup> Beau Canada Exploration v. Alberta (Energy & Utilities Board), [2000] A.J. No. 507 (C.A.) (“Beau Canada”) at para 28

<sup>4</sup> Ontario Energy Board Decision and Order, RP-2005-0013 / EB-2005-0031 (February 24, 2006) (“Boniferro”)

<sup>5</sup> Energy Pricing, Conservation and Supply Act, 2002, S.O. 2002, c.23 amended the Ontario Energy Board Act, 1998 by adding section 79.3 which provided:

Orders under s. 78 in effect on Nov. 11, 2002

79.3 (1) If an order under section 78 was in effect on November 11, 2002, the order applies to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

Interim orders

(2) If an interim order under section 78 was in effect on November 11, 2002, the order shall be deemed to be a final order and applies to electricity used on or after December 1, 2002. 2002, c. 23, s. 4 (11).

charged by GLPL during the rate freeze. The Board refused the request and confirmed the general policy against retroactive rate-making in relation to final orders and stated:

“Bill 210 made the interim GLPL rate order a final rate order. Therefore we are of the view that changing rates prior to April 1, 2005 would be retroactive ratemaking. As the Board has stated in numerous cases, the Board does not endorse retroactive rates.”<sup>6</sup>

Board staff submits that the Board does not have jurisdiction to grant Brant County's request to adjust historic rates contained in a final rate order because doing so would be an exercise in retroactive or retrospective rate-making.

### **Determination of Arrears**

Board staff submits that September 1, 2008 should be the date from which the arrears are calculated. The GS 50 – 4,999 kW rates that were in place prior to the 2008 rates were based on the 2006 EDR which excluded the Brant County volumes. Brantford's costs were fully covered by the rates set in the 2006 EDR, and adjusted in the 2007 IRM. Since Brantford has not submitted a proposal to return any of the arrears to the other classes from collections prior to September 2008, Board staff submit that Brantford is simply trying to grab a windfall.

The 2008 rates have been determined final by the Board. They can not be retroactively changed. In determining the arrears from the GS 50 – 4,999 kW rate, any RTS included in the balance is to be used as a credit to reduce the balance found by the Board for the RTS Settlement Issue below.

### **Interest**

Board staff submits that interest on this amount should be charged as if these costs were in a deferral account. Normally a 1.5% a month charge is levied on late payments as found in the Tariff of Rates and Charges. However, this Motion is an exceptional case and Board staff feels that interest at that level is punitive considering the merits of this Motion. Therefore the Board published rates as found on the OEB website for the date of the cost incurrence should be employed.

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<sup>6</sup> Ontario Energy Board Decision and Order, RP-2005-0013 / EB-2005-0031 (February 24, 2006) (“Boniferro”) at pp 6-8. The minority decision found that the issue of retroactivity did not apply in the case before the Board and that the Domtar rate should not have been applied to Boniferro

## **IRM Adjustments**

If the Board finds that Brant County should not be in the GS 50 – 4,999 class, it is possible that other rates may change. To implement the changes, the rates that will need to be adjusted are the rates underpinned by the costs in the cost allocation filed in response to Board staff Interrogatory 9, which are for 2008. Board staff submits that if any rate changes flow from this Motion, that they be further adjusted to reflect the 2009 IRM to make them current.

## **RTS Settlement**

Brant County has requested an Order specifying which date Brantford is entitled to start the accumulation of the arrears for the RTS Network and RTS Connection costs at Colborne East and Colborne West.

### ***The Commencement Date for Calculating the Arrears for RTS Costs***

In response to a letter from Brant County on April 21, 2009 requesting an adjournment, Procedural Order #3 was issued to allow time to gather information from the IESO regarding issues with certain Retail Transmission Rates (“RTS”). As a result of this information, Brantford is requesting \$1,897,689.53 for RTS costs for which it has not billed Brant County. This amount is for costs dating back to February 2006. Brant County stated that it should not be responsible for the full amount.

With respect to the RTS claimed by Brantford, Brant County, in its submissions at paragraph 69, does not dispute that it is responsible for the RTS charges going forward. The issue before the Board is how far back Brantford should be allowed to recover the RTS charges.

Board staff submits that Brantford's claim against Brant County is in the nature of debt action, that is a claim for monies owed to Brantford, and is governed by the Limitations Act, 2002, S.O. 2002, CHAPTER 24, Schedule B. The Limitations Act, 2002 introduced a basic limitation period of two (2) years from the date a claim arises or the claiming party 'discovered' the claim or should have discovered the claim. Brantford's claim - the right to be paid RTS charges - arose on the date that it acquired the subject assets (October 2005) and it therefore has 2 years from that date to commence an action for payment, if it brought an action in court. The Limitations Act, 2002, section 5(2) presumes that a person with a claim knows of its right to make the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved. A potential claimant is not entitled to a longer limitation period by arguing that it had not

'discovered' its right to make a claim until some later date, unless the delayed discovery is reasonable. Section 5(1)(b) provides that the 'discovery' of a claim occurs on the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the circumstances giving rise to the claim. Board staff submits that Brantford is a relatively sophisticated commercial entity that should have exercised greater diligence in exercising its right to charge the RTS soon after acquiring the two Colborne assets. However, it failed to take steps to protect its entitlement to the RTS charges by making a demand or submitting an invoice to Brant County within the 2 year limitation period, that is by October 2007.

Brantford's claim for the RTS is not completely proscribed by the Limitations Act, 2002 since the claim has been ongoing. Accordingly Board staff submits that any amounts owed by Brant County for 2 years prior to the date that Brantford made its claim (December 11, 2009) are outside the limitation period and Brantford should only be entitled to recover amounts from and after December 10, 2007 and going forward

### ***Interest***

Board staff submits that interest on this amount should be charged as if these costs were in a deferral account. Board staff does not agree with Brant County that there should be no interest charged. Board staff feels both parties are culpable on this matter. Therefore the Board published rates as found on the OEB website for the date of the cost incurrence should be employed.

### **The Settlement**

Board staff submits that the term over which arrears are collected should be based on Brant County's ability to pay. Brant County will be paying for both; any arrears from distribution rates, and any settlement from RTS billings. Brant County's revenue requirement in the 2006 EDR was \$5,027,313. Through the IRM process, that would have been indexed to approximately \$5,200,000. Board staff would like to point out that at \$100,000 per month as suggested in the AIC, Brant County will pay \$1,200,000 a year. This amount is approximately 23% of the revenue requirement. Board staff submits that in reply Brant County should address the impact on customers and whether they can financially absorb \$100,000 per month.

*All of which is respectfully submitted.*